## National Labor Relations Board



Progressive Transportation

Services, Inc.

# Weekly Summary of NLRB Cases

Division of Information	Washington, D.C. 20570	Tel. (202) 273-1991
December 5, 2003		W-2924
<u>VISIT W</u>	CASES SUMMARIZED /WW.NLRB.GOV FOR FULL TEXT	
Arvinmeritor, Inc.	Newark, OH	1
Diamond Walnut Growers, Inc.	Stockton, CA	1
G.I. Milliken Plastering	Chelsea, MI	2
Glesby Wholesale, Inc.	Oakland, CA	3
Goldens Foundry & Machine Co.	Columbus, GA	4
Iron Workers Local 1 (Goebel Forming, Inc.)	Chicago, IL	4
Lincoln Center for the Performing Arts, Inc.	New York, NY	5
Los Angeles Water and Power Employees Association	Los Angeles, CA	6
Music Express East, Inc.	Elmwood Park, NJ	6
Nick and Bob Partners et al.	Lemont Furnace, PA	7
Ogden Ground Services, Inc.	Los Angeles, CA	8
Operating Engineers Local 3 (20-CC-3381-2)	Alameda, CA	8
Operating Engineers Local 3 (20-CD-718-1)	San Francisco, CA	9

**Dutchess County, NY** 

Shearer's Foods, Inc.	Canton, OH	9	
St. Luke's Health System, Inc.	Sioux City, IA	10	
Stormont-Vail Healthcare, Inc.	Topeka, KS	11	
TNT Logistics of North America, Inc.	Cape Coral, FL	11	
Wal-Mart Stores, Inc.	Noblesville, IN	12	
Zarcon, Inc.	Springfield, MO	13	
OTHER CONTENTS			
List of Decisions of Administrative Law Judges		14	
List of No Answer to Complaint Cases		14	
List of Test of Certification Cases		14	
Press Release ( <u>R-2512</u> ): Elizabeth Tursell is Appointed Deputy to the Assistant General General Counsel in NLRB's Division of Operations-Management			

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Press Release (R-2513): NLRB General Counsel Issues Report on FY 2003 Operations

General Counsel Memorandum (GC 04-01): Summary of Operations (Fiscal Year 2003)

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Arvinmeritor, Inc. (8-CA-33322-1; 340 NLRB No. 124) Newark, OH Nov. 24, 2003. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) of the Act by unilaterally repudiating its obligations to meet with the Skilled Trades Committee for the purposes of entertaining and processing the grievances of the skilled trades employees; and violated Section 8(a)(1) when Maintenance Manager Combs threatened employees with unspecified reprisals if they continued to attempt to assert their Section 7 right to file and process grievances under the existing collective-bargaining agreements between the Respondent and UAW Local 1037. [HTML] [PDF]

The Board agreed with the judge that pursuant to *Postal Service*, 302 NLRB 767 (1991), the 8(a)(5) complaint allegation is not appropriate for deferral under *Collyer Insulated Wire*, 192 NLRB 837 (1971). It also relied on *American Commercial Lines*, 291 NLRB 1066 (1988). The Board noted that the 8(a)(5) allegation that the Respondent seeks to defer is closely interwined with the 8(a)(1) allegation that Combs threatened employees with unspecified reprisals, that the Respondent did not request that the 8(a)(1) allegation be deferred, and that it did not make sense to refrain from deciding the closely-related 8(a)(5) issue since it resolved the 8(a)(1) issue.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by UAW Local 1037; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark on May 29, 2003. Adm. Law Judge David L. Evans issued his decision July 29, 2003.

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Diamond Walnut Growers, Inc. (32-CA-17353, et al.; 340 NLRB No. 135) Stockton, CA Nov. 28, 2003. Agreeing with the administrative law judge, the Board held that the Respondent violated the Act by failing to reinstate former economic strikers Rosa Elena Juarez and Willie Smith. It also agreed that the Respondent did not violate the Act by failing to reinstate and/or offer 25 former strikers available positions which were not substantially equivalent to their prestrike jobs because it was not obligated to notify the 25 former strikers when it placed the positions up for bid pursuant to an internal job posting system. [HTML] [PDF]

Contrary to the judge, the Board found that Willie Smith is only entitled to backpay for 6 weeks and that the Respondent did not unlawfully fail to reinstate and/or offer nonequivalent employment to former strikers Regina Herbert and Art Torres. Member Walsh, dissenting in part, would not limit Willie Smith's backpay period to 6 weeks.

Citing *Rose Printing Co.*, 304 NLRB 1076 (1991), the Board found that the record did not support the judge's finding that the packaging machine mechanic position, which became available after Torres submitted an unconditional offer to return to work, was substantially to his prestrike position as a lead maintenance mechanic. The Board found that the Respondent did not violate the Act by failing to offer Herbert (a full-time regular employee assigned to drive a forklift at the time of the strike) a seasonal bid job as a lift truck operation. In so doing, the Board noted its prior finding that unreinstated former strikers are not entitled to be considered for seasonal bid jobs, because they do not represent actual vacancies.

When the strike began, Smith was an ESM operator whose primary function is to sort walnuts using an Elbascan sorting machine. During the strike, the Respondent purchased new Elbascan machines that were more highly automated and computerized. It consolidated some of the ESM operators' functions. In March 2000, the Respondent offered to train Smith in the newly constituted ESM operator position. Smith accepted and trained for about 6 weeks when he voluntarily "signed off," i.e., relinquished his bid right to perform that specific job, because he "had difficulty learning the new job . . . preferring forklift work." The judge found, and the Board agreed, that the Respondent unlawfully failed to reinstate Smith to an ESM operator position that was posted in October 1998.

Chairman Battista and Member Schaumber reasoned that "had the Respondent offered Smith the EMS operator position in 1998, as it was required, Smith would have received the same training that he received in 2000, and would have resigned before completion as he did in 2000." Accordingly, they held that Smith voluntarily abandoned his interest in the ESM operator position by his resignation, that his backpay period shall run for 6 weeks, and that the Respondent is not obligated to offer him reinstatement.

Member Walsh would find, consistent with Board precedent, that Smith is entitled to backpay from 1998, when he should have been offered the ESM training, until 2000 when he was offered the training. See NLRB Casehandling Manual (Part 3) Compliance Proceedings Sec. 105.30.2 (defining backpay period as "beginning when the unlawful action took place and ending when a valid offer of reinstatement is made").

Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Teamsters Local 601; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Stockton on 6 days beginning Jan. 9, 2001. Adm. Law Judge James J. Kennedy issued his decision Sept. 24, 2001.

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G.I. Milliken Plastering (7-RC-22439; 340 NLRB No. 138) Chelsea, MI Nov. 28, 2003. The Board found, contrary to the Regional Director, that an election should have been ordered in a proper residual unit of the Employer's unrepresented plasterers employed at its Chelsea, MI facility, and remanded the case to the Regional Director to determine the proper residual unit for an election. The Acting Regional Director had dismissed the instant petition filed by Bricklayers Local 9, finding it was barred by a collective-bargaining agreement between the Employer and Operators Local 16. [HTML] [PDF]

The Employer is a member of the Washtenaw Contractors Association (WCA), and since 1997, through the WCA, has been a party to a Section 8(f) agreement covering work performed at certain limited areas in Michigan, including all of Washtenaw County (where the Employer's Chelsea facility is located) and eight townships in Livingston County. The Employer and Local 16 are parties to a Section 9(a) collective-bargaining agreement covering work in the

Lansing/Jackson area (Lansing/Jackson Agreement). The geographic coverage of the Lansing/Jackson Agreement does not embrace the Employer's Chelsea location.

The Acting Regional Director found that Local 16 had a 9(a) agreement with the Employer covering work in the Lansing/Jackson areas and in the Flint area by operation of the Lansing/Jackson contract's traveler clause. Accordingly, he found the instant petition barred and denied the Petitioner's request to run an election in a residual unit.

Local 9 contended, in its request for review, that 1) the Acting Regional Director erred in finding a contract bar because Local 16 failed to introduce the full agreement at the hearing, 2) the contract cannot serve as a bar because its geographically-limited unit is inappropriate, and 3) even if there is a contract bar, it should only extend to the areas covered by the agreement and an election should be run in a residual unit.

The Board said it could not, on the present record, determine if the petitioned-for unit includes all of the Employer's unrepresented employees and, accordingly, remanded the case to the Regional Director to reopen the record to establish whether the application of the traveler clause bars the petition and the proper scope of the residual unit, if any.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Glesby Wholesale, Inc. (32-CA-19146(E), 19241(E); 340 NLRB No. 128) Oakland, CA Nov. 28, 2003. The Board affirmed the administrative law judge's decision and dismissed the application for fees and expenses pursuant to the Equal Access to Justice Act (EAJA) filed by Respondent-Applicant Glesby Wholesale, Inc. The Board concluded that the General Counsel's position as a whole in the underlying case was substantially justified. [HTML] [PDF]

The complaint alleged that the Applicant violated the Act by interrogating Russell Johnson on two occasions about his union activity, denying Russell a day's work because of his union activity, offering to keep Russell's son Eugene employed if Russell would stop supporting Teamsters Local 853, and later terminating Eugene, also because of Russell's union activity. The judge dismissed the complaint, finding that General Manager Scharffenberg's questioning of Russell was not unlawfully coercive, that Russell was sent home solely due to lack of work, and that Eugene was hired only as a temporary driver during another driver's disability leave and that he was terminated solely because the driver had returned to work. The General Counsel filed no exceptions and the Board adopted the judge's decision.

The Applicant asserted that the General Counsel had no substantial basis for litigating the interrogation allegations, the denial of work to Russell, and the termination of Eugene. The Applicant did not seek fees with respect to the allegation that Operations Manager Robert Avila unlawfully offered to keep Eugene employed and did not contend that the allegation lacked substantial justification. Further, it did not except to the judge's finding, which becomes final, that the Region had substantial justification for making the allegation that Eugene Johnson was

unlawfully terminated. Instead, the Applicant claims that the General Counsel should have moved for dismissal of this allegation at the end of the hearing.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Jay R. Pollack issued his supplemental decision Sept. 4, 2002.

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Goldens Foundry & Machine Co. (10-CA-32913, 33376; 340 NLRB No. 140) Columbus, GA Nov. 28, 2003. The Board agreed with the administrative law judge, for the reasons stated by him, that the Respondent violated Section 8(a)(1) of the Act by threatening employee Anthony Jones, and explained its reasons for affirming the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Jones. [HTML] [PDF]

The judge found, and the Board agreed, that the General Counsel established his initial burden of proof under *Wright Line*. The General Counsel established that Jones engaged in protected activity by having Glass Workers International pursue a grievance against his supervisor John Toland, that Toland and Human Resource Manager Judith Giddings knew about the Union's involvement in Jones' grievance, and that Jones' discharge occurred shortly thereafter. The judge found that there was evidence of antiunion animus on the part of Toland, not Giddings, the decisionmaker, and that Giddings made her decision to discharge Jones without knowledge of Toland's illegal threat to Jones about pushing the issue to the fullest extent because Jones had involved the Union. The judge imputed Toland's animus to Giddings and found the violation.

The Board held that Toland's unlawful motivation must be imputed to Giddings because were it not for the fact that Toland brought Jones' purported misconduct to Giddings' attention, Jones would not have been discharged. "Giddings' good-faith belief in what Toland falsely told her does not insulate the Respondent from the consequences of its action in discharging Jones in reliance thereon," the Board said. It also agreed that the Respondent failed to meet its *Wright Line* burden of establishing that it would have discharged Jones even absent his protected activity, noting that Toland's lie, which was the deciding factor for Giddings' decision to fire Jones, "arose and was maintained due to Jones' protected activity."

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by Anthony Jones and Darwin Lipscomb; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Columbus for 2 days in Feb. 2002. Adm. Law Judge William N. Cates issued his decision March 22, 2002.

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*Iron Workers Local 1 (Goebel Forming, Inc.)* (13-CD-661; 340 NLRB No. 136) Chicago, IL Nov. 28, 2003. Relying on the factors of collective-bargaining agreements, employer preference, and employer practice, Chairman Battista and Member Schaumber awarded the installation of

metal embeds attached to the structural steel of the building at 540 West Madison Street, Chicago, IL to employees of Goebel Forming, Inc., represented by the Carpenters Chicago and Northeast Illinois District Council, not Iron Workers Local 1. The majority found that the three factors in favor of an award to the Carpenters-represented employees outweighed the factors of area practice and interunion agreement, saying the factor of employer preference "is entitled to substantial weight." [HTML] [PDF]

Dissenting Member Walsh found that the majority erred in its final analysis of two key factors relevant to determining the appropriate assignment of the disputed work and, accordingly, erred in awarding the disputed work to employees represented by Carpenters, rather than to employees represented by Iron Workers. He pointed out that several of the relevant factors are not helpful to resolving the dispute because neither Union is the certified bargaining representative of the Employer's employees; neither Union has a collective-bargaining agreement with the Employer covering the work in dispute; both groups of employees possess the necessary skills and training; and an award to either group of employees would not materially affect the economy and efficiency of the Employer's operations. Accordingly, Member Walsh found it appropriate to give greater weight to the factors of area practice and the interunion agreement, which favor an award to Iron Workers-represented employees, than to the factors of employer preference and past practice, which favor an award to Carpenters-represented employees.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Lincoln Center for the Performing Arts, Inc. (2-CA-32983; 340 NLRB No. 134) New York, NY Nov. 28, 2003. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by promulgating its no-leafleting policy to discourage protected conduct by representatives of Hotel Employees and Restaurant Employees Local 100 and by discriminatorily enforcing its policy on May 11, 2001. The Board found it unnecessary to pass on a third possible basis for finding a violation, i.e., that the Respondent violated Section 8(a)(1) by excluding and attempting to exclude union leafletters without having a property right entitling it to do so. [HTML] [PDF]

The Board also found it unnecessary to pass on the judge's additional finding that the Respondent violated Section 8(a)(1) by discriminatorily enforcing its no-leafleting policy on June 28, 2001, and the subsidiary finding that Section 10(b) did not bar the General Counsel from including that allegation in the complaint. The Board explained that the finding of a violation on June 28, 2001 would be cumulative of the violation found on May 11 and would not materially affect the remedy.

Following issuance of the judge's original decision, the Board granted the Respondent's motion to reopen the record to provide the Respondent an opportunity to adduce evidence that Dennis Diaz, the principal witness testifying on behalf of the General Counsel, allegedly committed perjury while testifying during the original hearing.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Hotel Employees and Restaurant Employees Local 100; complaint alleged violation of Section 8(a)(1). Original hearing held July 11, 12, and 25, 2001 and reopened hearing held on Dec. 5, 2002. Adm. Law Judge Steven Fish issued his original decision April 1, 2002 and his supplemental decision June 20, 2003.

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Los Angeles Water and Power Employees Association (21-RC-20514; 340 NLRB No. 146) Los Angeles, CA Nov. 28, 2003. The Board overruled the challenges to the ballots cast by lead clerical Soane Clark and accountant Julie Surmeian in an election held Sept. 12, 2002, and remanded the proceeding to the Regional Director to open and count their ballots and to issue a revised tally of ballots and the appropriate certification. The election resulted in 2 for and 1 against the Communications Workers, with 2 determinative challenged ballots. [HTML] [PDF]

The Employer is a nonprofit corporation that provides benefits and services to employees and retirees of the Los Angeles Department of Water and Power. It challenged the ballot of Clark on the ground that she is a supervisor within the meaning of the Act. The hearing officer found, with Board approval, that the Employer failed to establish that Clark is a supervisor under Section 2(11). The Union challenged the ballot of Surmeian on the ground that her job classification, "accountant," is not included in the stipulated bargaining unit. The Board reversed the hearing officer's finding that the parties intended to exclude the job classification of "accountant" from the bargaining unit and, applying a community-of-interest analysis, included Surmeian in the unit.

(Chairman Battista and Members Liebman and Walsh participated.)

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Music Express East, Inc. (22-CA-25174; 340 NLRB No. 129) Elmwood Park, NJ Nov. 28, 2003. The administrative law judge found, with Board approval, that the Respondent violated Section 8(a)(2) and (1) of the Act by dominating and interfering with the formation and administration of, and rending unlawful assistance and support to the Chauffeurs Committee as a means of drawing support away from Teamsters Local 805 (the Union); and violated Section 8(a)(1) by coercively interrogating its employees concerning their activities for the Union; soliciting grievances with an implied promise of benefits, promising and granting its employees benefits in order to discourage them from supporting the Union, and creating the impression that employees' union activities were under surveillance. [HTML] [PDF]

Chairman Battista and Member Schaumber dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) by discharging employee Emad Mercho. They found, contrary to the judge, that the General Counsel failed to establish his burden under *Wright Line* that the Respondent discharged Mercho because of his union activities by showing that Respondent's General Manager Badalamenti, who decided to discharge Mercho, knew that he had engaged in union activities or supported the Union.

Member Walsh, dissenting on this issue, would affirm the judge's conclusion that the Respondent unlawfully discharged Mercho, agreeing with the judge that the General Counsel presented "compelling evidence"—both direct and circumstantial—that the Respondent knew that Mercho was a union adherent.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Teamsters Local 805; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing at Newark, Sept. 3, 4, 5, and 24, 2002. Adm. Law Judge Steven Fish issued his decision May 14, 2003.

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Nicholas Morrone and Robert M. Verbosky d/b/a Nick and Bob Partners et al. (6-CA-33210; 340 NLRB No. 142) Lemont Furnace, PA Nov. 28, 2003. Members Liebman and Walsh granted in part and denied in part the General Counsel's motion for default judgment based on the Respondent's failure to answer the complaint. Chairman Battista, dissenting, found that the complaint is not well pleaded and would deny the motion in its entirety. [HTML] [PDF]

Members Liebman and Walsh decided that the undisputed complaint allegations are sufficient to establish that the Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union support and sympathies, and violated Section 8(a)(5) and (1) by failing to provide the Union with notice and an opportunity to bargain over the effects of its decision to close its Lemont Furnace, PA facility and cease operations, including the layoff of unit employees and subcontracting of unit work, and by failing to continue in effect the terms and conditions set forth in the collective-bargaining agreement.

The majority denied the motion for default judgment with respect to allegations that the Respondent unlawfully failed to bargain over its decisions to close its facility and cease all operations, and remanded the allegations for further appropriate action. The complaint alleged that the decisions were mandatory subjects of bargaining. Members Liebman and Walsh found that the allegations do not support a cause of action, citing the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981).

Chairman Battista agreed that the complaint alleges insufficient facts to show that the closing of the Respondent's facility itself was a mandatory subject of bargaining and with the denial of summary judgment in this respect. He believes the Respondent's subcontracting and layoff decisions were part and parcel of the decision to go out of business. Given that the decision to go out of business is not a mandatory subject, decisions that are part and parcel of the basic decision to go out of business are also nonmandatory subjects, he reasoned. The Chairman noted several factors in finding that the complaint is not well pleaded, including that the subcontracting and layoffs are separately alleged and thus it is unclear as to whether the "effects" generally mentioned in paragraph 23 are intended to refer to subcontracting and layoffs. He also observed that while the complaint alleges that the subcontracting and layoffs are violation of the contract, a mere breach of contract is not a violation of Section 8(a)(5).

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Carpenters Greater Pennsylvania Regional Council; complaint alleged violation of Section 8(a)(1) and (5). General Counsel filed motion for default judgment July 21, 2003.

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John Menzies, PLC, d/b/a Ogden Ground Services, Inc. (31-RC-8191; 340 NLRB No. 137) Los Angeles, CA Nov. 28, 2003. The Board found that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the National Mediation Board (NMB) pursuant to Section 201 of Title II of the Railway Labor Act (RLA). Accordingly, the petition filed by Transportation Workers seeking to represent a certain group of the Employer's employees working at the Los Angeles International Airport (LAX) in Los Angeles, CA, was dismissed. [HTML] [PDF]

The Employer provides aviation support services for several domestic and international carriers. At the Board's request, the NMB studied the record in this case and concluded that the Employer is a carrier subject to the RLA. The NMB specifically concluded that the facts here are distinguishable from previous NMB cases involving Ogden operations where it has determined that those operations were not subject to the RLA. See e.g., *Ogden Aviation Service*, 23 NMB 98 (1996); *Ogden Aviation Service*, 20 NMB 181 (1993). See also *Ogden Aviation Service*, 320 NLRB 1140 (1996).

(Members Liebman, Schaumber, and Walsh participated.)

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Operating Engineers Local 3 (Cross-Link Inc. d/b/a Westar Marine Services) (20-CC-3381-2; 340 NLRB No. 127) Alameda, CA Nov. 28, 2003. The Board affirmed the administrative law judge's findings, as amended, and held that the Respondent violated Section 8(b)(4)(ii)(B) of the Act by threatening to cause a work stoppage on the Richmond-San Rafael Bridge Retrofit Project of the Tutor-Saliba/Koch/Tidewater Joint Venture, with an object to force or require the Joint Venture to cease doing business with Westar Marine Services. The Board amended the judge's conclusions of law and modified his cease-and-desist order to conform to the violation alleged in the complaint and established at the hearing. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Operating Engineers Local 3; complaint alleged violation of Section 8(b)(4)(ii)(B). Hearing at San Francisco, Nov. 18, 19, and 21, 2002. Adm. Law Judge Clifford H. Anderson issued his decision March 31, 2003.

Operating Engineers Local 3 (Cross-Link, Inc. d/b/a Westar Marine Services (20-CD-718-1; 340 NLRB No. 131) San Francisco, CA Nov. 28, 2003. The Board decided that employees of Westar Marine Services represented by the International Organization of Masters, Mates, and Pilots are entitled to perform work on construction boats or vessels used as work boats by Westar at the Richmond-San Rafael Bridge Seismic Retrofit Project, including, but not limited to, moving barges, moving materials by barge, and transporting employees and other personnel to locations on the bridge project. Operating Engineers Local 3 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Westar to assign the disputed work to employees represented by it. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

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Progressive Transportation Services, Inc. (3-RC-11287; 340 NLRB No. 126) Dutchess County, NY Nov. 26, 2003. Chairman Battista and Member Schaumber found, contrary to the hearing officer, that Deck Lead Supervisor Sandra Yozzo is a supervisor within the meaning of Section 2(11) of the Act and sustained the challenge to her ballot. The majority certified the results of the election held January 9, 2003, which showed 2 for and 2 against Teamsters Local 445, with 1 challenged ballot (Yozzo's). Member Walsh, dissenting, agreed with the hearing officer that the challenge to Yozzo's ballot should be overruled. He found that the Employer failed to provide that Yozzo uses independent judgment to effectively recommend discipline. [HTML] [PDF]

(Chairman Battista and Members Schaumber and Walsh participated.)

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Shearer's Foods, Inc. (8-CA-32917, et al.; 340 NLRB No. 132) Canton, OH Nov. 28, 2003. The Board agreed with the administrative law judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging David Vaughn and violated Section 8(a)(1) by threatening to close its plant if Bakery Workers Local 19 came in. The Board found that the General Counsel met his burden of proof by showing that Vaughn's protected activity was a motivating factor in the Respondent's decision to discharge him. Vaughn had distributed union authorization cards after work in the employee parking lot on several occasions and the Respondent knew about Vaughn's protected activity and displayed its animus against employee Section 7 activities. The Respondent failed to prove that it would have discharged Vaughn even in the absence of his protected activity for threats he allegedly made against Company President Shearer. [HTML]

In a footnote, Member Schaumber noted that the Board, administrative law judges, and circuit courts of appeals in variously describing the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line* have added a fourth element—the necessity for there to be a causal nexus between the union animus and the adverse employment. He agrees

with the addition and believes in the near future the Board should adopt and thereafter consistently apply a single statement of the elements of proof, but that it is not necessary to address the issue here in deciding that the General Counsel met his burden.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Bakery Workers Local 19; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Canton on Sept. 17, 2002. Adm. Law Judge Robert A. Pulcini issued his decision March 28, 2003.

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St. Luke's Health System, Inc. (18-RC-16937; 340 NLRB No. 139) Sioux City, IA Nov. 28, 2003. Chairman Battista and Member Schaumber found that the Employer has rebutted the single-facility presumption and held, contrary to the Regional Director, that the petitioned-for single-facility unit of professional employees, excluding physicians at the Employer's Sunnybrook facility in Sioux City, Iowa, is inappropriate. The majority reversed the Regional Director's decision and direction of election and remanded the proceeding for further appropriate action, explaining: "[T]he interests of the petitioned-for employees have been effectively merged into a more comprehensive unit, such that the petitioned-for clinic is not a separate appropriate unit." [HTML] [PDF]

Member Walsh, dissenting, agreed with the Regional Director that a single-facility unit of professional employees at the Employer's Sunnybrook clinic is appropriate. He found that the Employer has failed to rebut the single-facility presumption because the record shows separate supervision and an absence of employee interchange at Sunnybrook.

The Employer operates a health care system in the Sioux City area that includes a network of 21 clinics operating out of 16 locations. The clinics, which are not separately licensed, provide nonacute health care-related services in family practice, rehabilitation, and specialty areas. The Employer's system also includes an acute care hospital, a college offering nursing and medical technology courses, and a nursing home.

UFCW Local 222 sought to represent a unit of only registered nurses at the Sunnybrook family practice clinic—one of 11 such clinics. The Union did not file a request for review of the Regional Director's inclusion of all other professionals (nurse practitioners and physician assistants), except physicians or of his direction that the medical technologist vote under challenge. The Employer, in its request for review, asserted that the smallest appropriate unit consists of all professional employees, other than physicians at the Employer's network of clinics in the Sioux City area. The Board granted the Employer's request for review by order dated March 13, 2002.

(Chairman Battista and Members Schaumber and Walsh participated.)

Stormont-Vail Healthcare, Inc. (17-RC-12100; 340 NLRB No. 143) Topeka, KS Nov. 28, 2003. The Board, reversing the Regional Director, included registered nurses (RNs) on the Employer's off-campus psychiatric facility, outlying clinics, and community nursing centers in the otherwise employer-wide multifacility unit of RNs found appropriate by the Regional Director. The Board decided that a multifacility unit, excluding the Stormont West psychiatric facility, the outlying clinics, and the community nursing centers is an arbitrary grouping of employees, inasmuch as the evidence failed to establish that the RNs in the unit found appropriate share a community of interest distinct form the included RNs. [HTML] [PDF]

The Employer operates a comprehensive regional medical system, which is highly centralized and includes a hospital complex in Topeka, KS consisting of four connected central inpatient acute hospital buildings with a single address, stipulated to be a single building. Teamsters Local 959 sought to represent a unit of RNs employed in the hospital complex only, which is stipulated to be a single facility.

The Regional Director found that a unit of approximately 700 full-time and regular part-time RNs employed by the Employer at its hospital complex and at about seven other buildings located within six blocks of the hospital complex (the main campus) in Topeka is appropriate for bargaining. The parties stipulated to the inclusion of about 11 RNs that work for LifeStar, a helicopter ambulance service owned and operated by the Employer, based in 3 locations 10 to 70 miles away from the hospital complex, and the RNs based at the Pozez Educational Center, a facility connected to the hospital complex by a walkway.

Applying the single facility presumption, the Regional excluded other non-main campus RNs employed by the Employer in Topeka and in surrounding towns throughout Topeka and Shawnee counties, including RNs at the Stormont-Vail West psychiatric facility, outlying clinics, and community nursing centers. Because the Petitioner agreed to a multi-facility unit, the Board found that the Regional Director erred by applying a single-facility presumption.

(Members Liebman, Schaumber, and Walsh participated.)

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TNT Logistics of North America, Inc. (12-CA-22309; 340 NLRB No. 141) Cape Coral, FL Nov. 28, 2003. The administrative law judge found, with Board approval, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging James Morgan on about June 18, 2002 and thereafter failing and refusing to reinstate him and Section 8(a)(1) by telling Morgan that it would be futile for him to select a union as his collective-bargaining representative. [HTML] [PDF]

In agreeing with his colleagues that the Respondent violated Section 8(a)(3) and (1) by discharging Morgan, Member Schaumber found the judge erred to the extent that he relied on the Respondent's hostility toward "unionization" in finding the violation, saying: "Employers have a right under Sec. 8(c) of the Act to openly oppose 'unionization'; however, they do not have a right to oppose or interfere with employees' Sec. 7 rights, such as the *right to organize a union*." Member Schaumber found that the Respondent, by making the statement to Morgan that he

should have known there could be no union, evidenced animus toward Sec. 7 pro-union activities in general and toward Morgan's specific activities seeking to organize a union in particular. He recommended that the Board use the term "Section 7 animus" rather than "anti-union animus" to avoid the same kind of error the judge made.

(Members Liebman, Schaumber, and Walsh participated.)

Charge filed by James Morgan, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Fort Meyers on April 7, 2003. Adm. Law Judge Keltner W. Locke issued his decision May 13, 2003.

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Wal-Mart Stores, Inc. (25-CA-27387-1, 27389; 340 NLRB No. 144) Noblesville, IN Nov. 28, 2003. Affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(1) of the Act by discriminatorily applying its solicitation/distribution policy at its Noblesville, IN store by unlawfully prohibiting union organizers from handbilling while allowing other organizations to solicit, and by contacting the police and causing them to warn the handbillers. [HTML] [PDF]

The Board found that the Respondent's solicitation policy allows solicitation on its property, outside its stores, at least 15 feet from entrances and exits, and that the Respondent informs prospective solicitors of the policy. At the Noblesville store, the Respondent insisted that the union organizers leave its premises without informing them of the policy or permitting them to solicit at least 15 feet from the entrances and exists. The Board found that the Respondent's actions were inconsistent with its written policy and its practice of explaining the policy to solicitors and giving them the opportunity to comply with it.

Chairman Battista noted that the Respondent discriminated against the Union by treating it differently than it treated all others with regard to solicitation. Accordingly, he found it unnecessary to reach the issue of whether an employer violates the Act by allowing solicitation by charitable organizations while restricting solicitation by all others, including unions.

The Board agreed with the judge that Muncie, IN Support Manager Douglas Roof did not engage in unlawful surveillance when he sat on a bench outside the store entrance for about 30 minutes, watching the organizers distribute handbills.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Food and Commercial Workers International; complaint alleged violation of Section 8(a)(1). Hearing at Indianapolis, Aug. 30-31, 2001. Adm. Law Judge Jerry M. Hermele issued his decision Dec. 14, 2001.

Zarcon, Inc. (26-CA-20603, 20604; 340 NLRB No. 145) Springfield, MO Nov. 28, 2003. The Board rejected the Respondent's exceptions and affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) of the Act by laying off Eric Berner because of his activities for Carpenters District Council of Kansas and Vicinity and refusing to hire nine employee-applicants because of their union affiliation. [HTML] [PDF]

The Respondent did not except to the judge's findings that it violated Section 8(a)(1) by informing its employees that it would have union organizers removed from the jobsite by law enforcement officers, informing its employees that an employee had been laid off because of his union activities, threatening that the Company would close if the Union succeeded in organizing its employees, and threatening employees with physical violence if they did not cease engaging in activities protected by Section 7.

The Charging Party filed exceptions to the judge's dismissal of the allegations that the Respondent unlawfully interrogated Michael Butts and Todd Bearden. The Board concluded that Supervisor Randy Lea unlawfully interrogated Butts concerning his union membership, activities, and sympathies in violation of Section 8(a)(1) and, thus, found it unnecessary to pass on the Bearden interrogation because it would not affect the Order.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Carpenters District Council of Kansas and Vicinity; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Springfield, Dec. 16-18, 2002. Adm. Law Judge George Carson II issued his decision March 7, 2003.

14

### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Deck Bros., Inc. and its alter ego, Kellner Bros., Inc. (Steelworkers) Buffalo, NY November 21, 2003. 3-CA-23914; JD-125-03, Judge Wallace H. Nations.

*The Hardaway Company* (Broilermakers) Tampa, FL November 20, 2003. 12-CA-19952; JD(ATL)-78-03, Judge Margaret G. Brakebusch.

Flat Dog Productions, Inc. (Stage Employees IATSE) Los Angeles, CA November 24, 2003. 31-CA-24062; JD(SF)-85-03, Judge Lana H. Parke.

Covisint LLC (an Individual) Southfield, MI November 26, 2003. 7-CA-45763; JD-132-03, Judge Martin J. Linsky.

*Auto Workers Local 2333* (an Individual) Cleveland, OH November 26, 2003. 8-CB-9023(E); JD-131-03, Judge Earl E. Shamwell, Jr.

KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa (Hotel & Restaurant Employees Local 2850) Berkeley, CA November 28, 2003. 32-CA-20417, 20433; JD(SF)-87-03, Judge Mary Miller Cracraft.

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### NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Wheels Transportation Services, Inc.; Gleb Glinka, Trustee in Bankruptcy (Teamsters Local 597) (1-CA-40832; 340 NLRB No. 130) Berlin, VT November 28, 2003.

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### **TEST OF CERTIFICATION**

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the ground that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Hospital General Menonita (Federacio Central De Trabajadores, UFCW, Local 481) (24-CA-9690; 340-NLRB No. 133) Cayey, PR November 26, 2003.

*Mail Contractors of America, Inc.* (Teamsters Local 470) (4-CA-32337; 340 NLRB No. 125) Little Rock, AR November 24, 2003.